

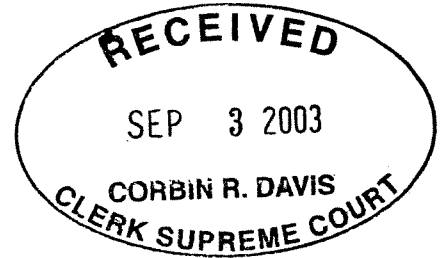
WILLIAM J. GIOVAN  
JUDGE

(313) 224-5430

September 2, 2003

Clerk of the Supreme Court  
P.O. Box 30052  
Lansing, MI 48909

Re: ADM File No. 2002-30



Dear Clerk:

The proposed amendment to MCR 2.106 (Process; Manner of Service) is apparently the result of my recommendation to the Court to amend MCR 2.106 (Notice by Posting or Publication). My original recommendation for amending subrule (A) of Rule 2.106 was as follows:

Rule 2.106 Notice by Posting or Publication

(A) Availability. This rule governs service of process ~~by publication or posting pursuant to an order under MCR 2.105(1)~~ IN ACTIONS WHERE PERSONAL JURISDICTION OVER THE DEFENDANT IS NOT REQUIRED.

The amendment as proposed by the Court, on the other hand, amends Rule 2.105 as follows:

Rule 2.105 Process; Manner of Service

(A)-(H)[Unchanged.]

(I) Discretion of the Court.

- (1) On a showing that service of process cannot reasonably be made as provided by this rule, the court may by order permit service of process to be made in any other manner reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard. However, notice by publication may not be used in a case in which personal jurisdiction over a defendant is sought.

First, it should be noted that the proposed amendment excludes only "publication" from cases requiring personal jurisdiction, leaving the possible implication that "posting" is available for such

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actions. "Posting," as defined by Rule 2.106, includes placing process in the courthouse and two other public places, a device which gives as little notice as publication in a newspaper.

More important, however, is that the Court's proposal leaves intact the statement in MCR 2.106(A) that publication or posting is used "pursuant to an order under MCR 2.106(I)." But MCR 2.105(I) is the rule that governs the process of substituted service calculated to give the defendant *actual notice*. The failure to eliminate that reference in Rule 2.106(A) leaves intact a major part of the fundamental flaw of Rule 2.106, i.e., the notion that service by publication or posting is one of the means available to give a defendant actual notice of the proceedings.

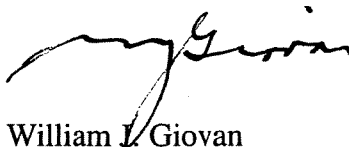
To the contrary, we know that service of process by publication or posting is a mere formality used for *in rem* proceedings when there is no hope of giving actual notice. As the court said in *Dow v State of Michigan*, 396 Mich 192, 207-208:

"Newspaper publication is a formality. A few institutional lenders may hire persons to scan such notices, but newspaper publication for most property owners provides no notice at all.

'Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. *In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.*' *Mullane v Central Hanover Bank & Trust Co.*, *supra*, p. 315. (Emphasis supplied.)"

I believe the preferred amendment, as originally proposed, is to make it clear in MCR 2.106 that publication and posting are simply not available where personal jurisdiction is required, rather than to insert any reference at all to publication and posting in MCR 2.106(I), which is limited to methods calculated to give actual notice.

Sincerely,



William J. Giovan

WJG:jc